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PETITION OF TIME WARNER TELECOM OF INDIANA, L.P. FOR CONFIDENTIAL AND PROPRIETARY TREATMENT OF PORTIONS OF ITS LOCAL COMPETITION SURVEY AS OF DECEMBER 31, 2004

CAUSE NO. 42828

On April 14, 2005, Time Warner Telecom of Indiana, L.P. ("Time Warner") filed its *Motion of Time Warner Telecom of Indiana, L.P. for Protection of Confidential and Proprietary Information* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"), seeking confidential treatment of certain designated responses to the Commission-issued *2004 Local Competition Survey.*

The portions of the *2004 Local Competition Survey* for which Time Warner seeks confidential protection are described as certain information relating to access lines as requested in Section II.A. of the *2004 Local Competition Survey* and information relating to the deployment of broadband services requested in Sections II. B. and II.C. of the *2004 Local Competition Survey*. Specifically, the information sought to be protected is certain statistical access line information of a type previously held to be subject to confidential treatment by the Commission as well as information about broadband access lines by technology and by geographic area. Therefore, Time Warner is requesting that its responses to Sections II.A., II.B. and II.C. of the *2004 Local Competition Survey* be treated as confidential information.

Time Warner seeks confidential protection pursuant to I.C. §8-1-2-29 and the Commission's procedural rule found at 170 I.A.C. 1-1.1-4, and relies on the trade secret exception to public disclosure of public records found at I.C. §5-14-3-4 and I.C. §24-2-3-2 as the basis for its confidentiality claim.

The Commission rule found at 170 I.A.C. 1-1.1-4 establishes procedures for claiming that material to be submitted to the Commission is confidential. This rule, among other requirements, states that a written application for a finding of confidentiality must be filed on or before the date (if any) the material is required to be filed (170 I.A.C. 1-1.1-4(a)), and the application shall be accompanied by a sworn statement or testimony that describes: the nature of the confidential information, the reasons why the material should be treated as confidential pursuant to I.C. §8-1-2-29 and I.C. §5-14-3, and the efforts made to maintain the confidentiality of the material. 170 I.A.C. 1-1.1-4(b).

Material filed with or submitted to the Commission prior to a finding of confidentiality is available for public inspection and copying. 170 I.A.C. 1-1.1-4(e).

Ten (10) days following receipt of an application for confidentiality the Commission may: (1) find the information to be confidential in whole or in part; (2) find the information not to be confidential in whole or in part; (3) issue a protective order or docket entry covering the information; and/or (4) find that information found to be not confidential should be filed in accordance with 170 I.A.C. 1-1.1-4. 170 I.A.C. 1-1.1-4(a). The Presiding Officer or any party may request an *in camera* inspection to hear argument on confidentiality of the material. 170 I.A.C. 1-1.1-4(c).

I.C. §8-1-2-29, a statute of specific applicability to the Commission, recognizes the relevancy of the Access to Public Records Act to the Commission's public records. I.C. §8-1-2-29(a) states:

> All facts and information in the possession of the commission and all reports, records, files, books, accounts, papers, and memoranda of every nature whatsoever in its possession shall be open to inspection by the public at all reasonable times subject to I.C. 5-14-3.

Indiana's Access to Public Records Act, found at I.C. §5-14-3, begins with an unambiguous policy statement that favors public disclosure of government information. I.C. §5-14-3-1 states:

> A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

The Indiana Utility Regulatory Commission, by application of the definition found at I.C. §5-4-3-2, is a "public agency:"

> "Public agency" means the following:
>
> (1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

I.C. §5-14-3-2 broadly defines a "public record" as:

> ...any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

A public agency must make its public records available for inspection and copying. "Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, **except as provided in section 4 of this chapter**." I.C. §5-14-3-3(a)(emphasis added.)

"Section 4" of I.C. §5-14-3 (I.C. §5-14-3-4) contains two (2) lists of public records that are nondisclosable. The first list, found at I.C. §5-14-3-4(a), describes those public records that a public agency may not disclose, unless access is specifically required by state or federal statute or ordered by a court under the rules of discovery. The second list, found at I.C. §5-14-3-4(b), describes public records that are nondisclosable at the discretion of a public agency. The public records at issue in this proceeding are public records that are claimed to contain trade secrets. "Records containing trade secrets" are excepted from public disclosure under I.C.5-14-3-4(a)(4) and, therefore, fall within the category of public records that a public agency may not disclose.

The Access to Public Records Act, at I.C. §5-14-3-2, states that "[t]rade secret' has the meaning set forth in I.C. 24-2-3-2." Indiana's adoption of the Uniform Trade Secrets Act is found at I.C. §24-2-3, and contains the following definition:

> 'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Indiana Courts describe trade secret information as containing four (4) elements: 1) information; 2) deriving independent economic value; 3) not generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) the subject of efforts, reasonable under the circumstances to maintain it secrecy. *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 813 (Ind. App. 2000.)

In several previous Orders, the Commission has considered and decided requests by some telephone companies to treat certain access line information as trade secret. Confidentiality of access line information has been an issue for some telephone companies not only in regard to the Local Exchange Carrier Annual Reports that they are required to submit to the Commission, but also with respect to access line information that the Commission requests in the Local Competition Survey also conducted by the Commission.

In its May 8, 2003 Order in consolidated Cause Nos. 42192, 42401, 42403, 42406, and 42429, the Commission found that access line information requested in the *2002 Local Competition Survey* did not constitute trade secret information. Relying on the same reasoning as applied in consolidated Cause Nos. 42192 *et al.*, the Commission determined in its June 26, 2003 Order in consolidated Cause Nos. 42427, 42428, 42430, 42431, 42432, 42433, 42434, 42435, 42437, 42438, 42439, 42440, 42441, and 42442 that access line information requested in the *2002 Annual Report* did not constitute trade secret information. Part of the reasoning to deny requests for confidential treatment of access line information in these two consolidated Causes was based on the immature state of competition among telephone companies in Indiana.

Requests for confidentiality of access line information was also considered by the Commission in its January 28, 2004 Order in consolidated Cause Nos. 42537, 42540, 42542, 42544, and 42545. The Commission concluded in this Order that, because of an increased level of competition among Indiana telephone companies, certain access line information in the *2003 Local Competition Survey* constituted trade secret information. This same reasoning was followed in the Commission's June 30, 2004 Order in consolidated Cause Nos. 42625, 42626, 42633, 42634, 42636, 42637, and 42638, wherein it was determined that certain access line information in the *2003 Annual Report* constituted confidential, trade secret information.

Thus, the Commission has recently determined that certain access line information similar to that requested in Section II.A can constitute trade secret information. While the Section II.C. information for which Time Warner is requesting confidential protection is not the same as that which was granted such treatment in the above mentioned causes, it is information on number of broadband lines by geographic location and therefore the reasoning is of a similar nature to that used in the January 28, 2004 order. Such recent determinations, however, do not relieve any person desiring confidential protection of a public record to be submitted to the Commission of the obligation to petition and factually demonstrate through Direct Testimony/Affidavit that the information should be exempt from public disclosure. They also do not bind the Commission in future proceedings from making determinations based on the facts presented at that time.

Time Warner seeks confidential protection of its responses to Sections II.A., II.B. and II.C. of the *2004 Local Competition Survey* which will reveal certain statistical access line and broadband service deployment information. Data submitted in this cause by Time Warner states that this information is protected by Time Warner within its

business structure to only those employees with a "need to know." The submitted data further asserts, with respect to the information deriving independent economic value, that disclosure of this information would be useful to current or potential competitors to evaluate market potential and/or market entry decisions. In support of the request for confidential treatment of the data sought in Section II. B. of the Survey, Pamela Sherwood asserts in her Affidavit that, when the FCC seeks that same data, it grants confidentiality of the data and allows it to be submitted under seal. She states that the same treatment is appropriate at the state level.

The Presiding Officer, having reviewed the Motion and its accompanying data, finds that there is a sufficient basis for a preliminary determination of confidentiality with respect to carrier responses in Sections II.A. and II.C. of the *2004 Local Competition Survey*. The submitted data contains a sufficient description of the nature of the information for which confidential treatment is sought. In presenting its case, Time Warner presented factual information sufficient to show that the designated responses for Sections II.A. and II.C. of the *2004 Local Competition Survey* contain information that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. The company also presented factual information sufficient to show that Time Warner has made reasonable efforts to maintain secrecy of the information for which confidential treatment is sought.

Section II.B. of the *2004 Local Competition Survey* seeks data pertinent to the deployment of broadband services, specifically, the number of high-speed lines by type of technology used to provision the service. Time Warner has presented argument that public access to this data would allow competitors to ascertain Time Warner's business and marketing strategies.

This section of the *2004 Local Competition Survey* is very similar to Part I.A of the *FCC's Form 477-Local Competition and Broadband Reporting* (OMB NO: 3060-0816). Pamela Sherwood asserts in her Affidavit that, when the FCC seeks the same data sought in Section II. B. of the Survey, the FCC grants confidentiality of the data and allows it to be submitted under seal. This assertion raises the following questions, which we pose as data requests:

- Has Time Warner ever petitioned the FCC for confidential treatment of responses provided to Part I.A of the *FCC's Form 477-Local Competition and Broadband Reporting (OMB NO: 3060-0816)?*
- If so, has the FCC granted the request?
- If so, please provide a copy of the FCC's ruling.

Time Warner is hereby requested to file responses to the above questions no later than COB May 13th. This Commission will not to make a determination on the confidentiality of Section II.B. for this Petititoner, Time Warner Telecom, until such time as responses to its questions have been received.

Time Warner should hand deliver to Commission Principal Telecommunications Analyst Mark Bragdon, in a sealed envelope that is clearly marked "confidential" and with the Cause Number noted thereon, its responses to Section II.A. and II.C. of the *2004 Local Competition Survey* no later than COB Thursday May 12, 2005. As with all information provided to the Commission pursuant to a finding of confidentiality, the responses should be submitted on green paper, thereby readily identifying the information as confidential. Time Warner's responses to Sections II.A. and II.C. of the *2004 Local Competition Survey* should, on a preliminary basis, be handled and maintained by the Commission as confidential in accordance with I.C. §5-14-3.

IT IS SO ORDERED.

Lorraine Hitz-Bradley, Administrative Law Judge

May 10, 2005
Date